

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

CLAUDE RANGER III,
Petitioner.

No. 2 CA-CR 2018-0278-PR
Filed December 13, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Pima County
No. CR20113403001
The Honorable Paul E. Tang, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Offices of Henry Jacobs PLLC, Tucson
By Henry L. Jacobs
Counsel for Petitioner

STATE v. RANGER
Decision of the Court

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

ECKERSTROM, Chief Judge:

¶1 Petitioner Claude Ranger III seeks review of the trial court's order denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Ranger has not demonstrated such abuse here.

Factual and Procedural Background

¶2 Following a jury trial in 2015, Ranger was convicted of aggravated assault and sexual assault. The trial court imposed a life term without the possibility of release for twenty-five years for sexual assault, to be followed by a twenty-five year prison term for aggravated assault. On appeal, we affirmed Ranger's convictions and his sentence for sexual assault but vacated his sentence for aggravated assault and remanded for resentencing on that count. *State v. Ranger*, No. 2 CA-CR 2015-0468, ¶¶ 5, 7 (Ariz. App. Dec. 27, 2016) (mem. decision). On remand, the court imposed a twenty-year prison term. We affirmed Ranger's new sentence on appeal. *State v. Ranger*, No. 2 CA-CR 2017-0363, ¶ 5 (Ariz. App. June 27, 2018) (mem. decision).

¶3 Ranger then sought post-conviction relief, asserting trial counsel was ineffective by failing to: 1) challenge the sufficiency of the evidence to prove sexual assault, to wit, that penetration had occurred, as set forth in the indictment; and, 2) object to a jury instruction which included irrelevant language permitting the jury to find him guilty of sexual assault without finding penetration. *See* A.R.S. §§ 13-1401(A)(4), 13-1406(A) (definition of sexual assault includes nonconsensual "sexual intercourse," which requires in pertinent part "penetration into the . . . vulva . . . by any part of the body or by any object or masturbatory contact

STATE v. RANGER
Decision of the Court

with the . . . vulva”).¹ Ranger also claimed he was entitled to an evidentiary hearing. The trial court summarily denied relief, and this petition for review followed.

¶4 “To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.” *State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant is entitled to an evidentiary hearing if he presents a colorable claim for relief, that is, “he has alleged facts which, if true, would *probably* have changed the verdict or sentence.” *State v. Amaral*, 239 Ariz. 217, ¶¶ 10-11 (2016). Courts “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 689.

Discussion

Failure to Challenge the Sufficiency of the Evidence

¶5 On review, Ranger contends counsel failed to challenge the sexual assault charge based on insufficient evidence that penetration occurred and suggests the trial court incorrectly found counsel’s conduct was tactical. He also contends the court improperly characterized as “erroneous” a portion of the testimony by Dr. Keith Kaback, the emergency room physician who examined the victim following the incident. And, while he acknowledges that penetration can be proved by circumstantial evidence, he nonetheless contends, based on the evidence presented at trial, that the court erroneously “determine[d] as a matter of law that evidence of penetration existed in sufficient quantity so that any rational trier of fact could so find that element beyond a reasonable doubt.”

¶6 At trial, Dr. Kaback testified that he found blood in the victim’s vagina and a laceration about an inch in length on the vulva, “at the mouth of the vagina.” Dr. Kaback “assume[d] that the blood in the vagina” was caused by the “tear at the entrance” thereto. When asked if the object that caused the laceration would have to “go beyond the vulva to get to that point,” Dr. Kaback responded, “[y]ou would not necessarily have to place an object deep into the vagina to cause that injury . . . [it] could

¹We cite the current version of the relevant statutes and rules in this decision, as they have not changed in material part since Ranger committed his offenses.

STATE v. RANGER
Decision of the Court

theoretically be caused by some force just in the external region.” During his testimony, Dr. Kaback referred to a diagram he marked when he examined the victim just after the incident occurred (Exhibit 123), which the trial court relied upon in its ruling; the exhibit showed the victim’s laceration “at the entrance” to the vagina, consistent with Dr. Kaback’s testimony and his detailed explanation that the vagina is located *inside* the vulva. As the court noted in its ruling, during Ranger’s cross-examination of Dr. Kaback, when asked if the laceration was on the “outside or inside of the vulva,” Dr. Kaback responded “on the outside.”

¶7 The seemingly contradictory portions of Dr. Kaback’s testimony can be explained by the fact that he describes the labia minora as parts of both the vagina and the vulva. But, both Dr. Kaback’s testimony and the diagram reflecting it, unambiguously identify a laceration to the victim’s labia minora. The labia minora, while described by Kaback as an external part of the vagina, is found on the inside portion of the vulva, within the labia majora. Dr. Kaback was therefore identifying an injury caused by penetration “into the . . . vulva.” In addition, scientific analysis revealed the presence of Ranger’s DNA in semen found on the victim’s underwear and robe, and on a tissue found inside the pocket of her robe. The trial court concluded counsel’s decision “not to argue lack of penetration appears to be a matter involving trial strategy,” noting that, “[g]iven counsel’s focus on challenging the forensic evidence in an attempt to plant reasonable doubt on identification of the assailant, there can be little question that defense counsel’s decision not to urge as a ground for Rule 20 insufficiency the element of penetration amounts to a tactical decision.”

¶8 “Disagreements as to trial strategy or errors in trial will not support a claim of ineffective assistance of counsel as long as the challenged conduct could have some reasoned basis.” *State v. Meeker*, 143 Ariz. 256, 260 (1984). In addressing the sufficiency of counsel’s performance, there is “[a] strong presumption” that counsel “provided effective assistance,” *State v. Febles*, 210 Ariz. 589, ¶ 20 (App. 2005), which the defendant must overcome by demonstrating that counsel’s conduct did not comport with prevailing professional norms, *see State v. Herrera*, 183 Ariz. 642, 647 (App. 1995). To overcome the presumption that his attorney pursued a sound trial strategy, a petitioner must show that the attorney’s decisions were not tactical in nature, but the result of “ineptitude, inexperience or lack of preparation.” *State v. Goswick*, 142 Ariz. 582, 586 (1984).

STATE v. RANGER
Decision of the Court

¶9 Here, the trial court determined “the evidence was not only substantial but overwhelming on the elements of sexual assault, including penetration.” The court also pointed out that although counsel had sought Rule 20 relief on the sexual assault count for a different reason, the court itself had “nonetheless made a record that there was sufficient evidence on the element of penetration for the jury to consider the count in deliberations,” thus showing that the court had considered “the very issue” Ranger asserts counsel should have raised as part of his Rule 20 motion.

¶10 The trial court also relied on Exhibit 123, noting that it “supports the physician’s observations in the ER of the location of this vaginal tearing.” The court thus concluded that, “given the physician’s earlier testimony and [the exhibit], there was more than sufficient evidence for the jury to deliberate on the sexual assault count as it could infer the existence of penetration from evidence showing that the laceration was in the outer lips of the vulva, running an inch downwards towards the anus.” The court also noted the jury could consider the semen found on the victim’s clothing and the tissue.

¶11 We note that Count two of the indictment charged Ranger with sexual assault, “[t]o wit: penetrating [the victim’s] vagina with his penis and/or fingers.” But the “[m]ere mention in the indictment of facts that the State intends to elicit in proving the crime does not transform those facts into elements of the offense. . . . [A]n indictment is deemed amended to conform to the evidence actually adduced at trial.” *State v. Marshall*, 197 Ariz. 496, ¶ 39 (App. 2000); *see also* Ariz. R. Crim. P. 13.5(b). “A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse . . . with any person without consent.” A.R.S. § 13-1406(A). “[P]enetration into the . . . vulva” constitutes sexual intercourse. A.R.S. § 13-1401(A)(4). The fact that the indictment here was more specific than the statute did not increase the state’s burden of proof. *See Marshall*, 197 Ariz. 496, ¶ 39.

¶12 We have reviewed the testimony and cross-examination of Dr. Kaback, and conclude the trial court correctly determined that “penetration ‘no matter how slight’ was proven by the State,” at the very least, penetration of the vulva. Additionally, Ranger has offered no evidence to show that the court abused its discretion in determining that counsel made anything but a reasoned, tactical decision when he failed to challenge the sufficiency of the evidence of penetration in his Rule 20 motion. And, even assuming without finding that counsel’s conduct was deficient, in light of the evidence presented at trial, Ranger has not

STATE v. RANGER
Decision of the Court

established how he was prejudiced. We thus conclude the court did not abuse its discretion by denying Ranger's claim.

Failure to Challenge the Jury Instructions

¶13 Ranger also contends counsel should have objected to the jury instruction related to the sexual assault charge,² essentially asserting counsel failed to ensure the jury found him guilty based only on the sexual assault allegation as charged in the indictment, rather than relying on irrelevant instructions. He argues that not only was there no evidence of

²The challenged jury instruction provided:

The crime of **Sexual Assault** requires proof that the defendant:

1. Intentionally or knowingly engaged in sexual intercourse or oral sexual contact with another person; *and*
2. Engaged in the act without the consent of the other person; *and*
3. The defendant knew the act was without the consent of the other person.

Previous definitions of “intentionally” and “knowingly” apply.

“Sexual intercourse” means penetration into the penis, vulva or anus by any part of the body or by any object or masturbatory contact with the penis or vulva.

“Sexual contact” means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact.

“Without consent” means that the victim is coerced by the immediate use or threatened use of force against a person.

STATE v. RANGER
Decision of the Court

digital or penile penetration, as charged in the indictment, but the instruction provided deprived him of the right to be convicted only of the specific acts charged. Finally, citing *United States v. Cronin*, 466 U.S. 648 (1984), he asserts prejudice is “presumed” here.

¶14 In its ruling denying relief, the trial court noted the jury instruction was a valid statement of the law, and pointed out that Ranger did “not argue its incorrectness nor cite any authority standing for the proposition that failing to exclude a superfluous though correct definition of law means that a lawyer commits [ineffective assistance of counsel].” Noting that jurors are presumed to follow the court’s instructions, *see State v. Reyes*, 232 Ariz. 468, ¶ 7 (App. 2013), the court further concluded that “[r]emoval of the surplusage language complained of by [Ranger] would not have altered the jury’s reasonable finding of guilt on either count of sexual assault or aggravated assault.”

¶15 Because the evidence at trial established that the victim’s vulva was lacerated and that Ranger’s semen was found on her clothing and the tissue in her pocket, the trial court did not abuse its discretion by concluding his conviction for sexual assault was “clearly supported by the evidence” and that removal of the surplus language from the jury instruction would not have changed the outcome at trial. And, as the court correctly noted, Ranger has not cited any authority suggesting that counsel fell below prevailing professional norms by failing to object to a legally correct instruction containing irrelevant additional language. *See Bennett*, 213 Ariz. 562, ¶ 21.

Disposition

¶16 Although we grant review, we deny relief.